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(I)

In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 709

PATSY MUTARIELLI, PETITIONER

v.

UNITED STATES OF AMERICA

**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE THIRD
CIRCUIT**

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (R. 230-232) has not yet been reported.

JURISDICTION

The judgment of the circuit court of appeals (R. 233) was entered November 27, 1945. The petition for a writ of certiorari was filed January 2, 1946. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules XI and XIII of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTION PRESENTED

Whether the evidence adduced at the trial in support of indictment No. 12972, charging a price ceiling violation, is sufficient to show that the sale price was in excess of the ceiling price.

STATUTE AND REGULATION INVOLVED

The Emergency Price Control Act of 1942, 56 Stat. 23, as amended, 58 Stat. 632 (50 U. S. C. App., Supp. IV, 901 et seq.), provides in pertinent part:

SEC. 2. (a) Whenever in the judgment of the Price Administrator * * * the price or prices of a commodity or commodities have risen or threaten to rise to an extent or in a manner inconsistent with the purposes of this Act, he may by regulation or order establish such maximum price or maximum prices as in his judgment will be generally fair and equitable and effectuate the purposes of this Act.

SEC. 4. (a) It shall be unlawful * * * for any person to sell or deliver any commodity, * * * in violation of any regulation or order under section 2 * * *.

SEC. 205. (b) Any person who willfully violates any provision of section 4 of this Act * * * shall, upon conviction thereof, be subject to a fine of not more than \$5,000, or to imprisonment for not more than two years in the case of a violation of section 4 (c) [relating to the disclosure or use for personal benefit of official infor-

mation by government officers] and for not more than one year in all other cases, or to both such fine and imprisonment.

Maximum Price Regulation No. 355, "Retail Ceiling Prices for Beef, Veal, Lamb and Mutton Cuts" (8 Fed. Reg. 4423; see also 9 Fed. Reg. 8794), provided, in part, as follows:

SECTION 1. *What this regulation does.*—

This regulation fixes dollar-and-cents ceiling prices on all retail sales of beef, veal, lamb and mutton cuts made on and after June 21, 1943 * * *. The only retail beef, veal, lamb and mutton cuts * * * which may be sold are those described in Section 20 of this regulation. * * *

* * * * *

SECTION 12. *Prohibition and Penalties.*—

(a) On and after May 17, 1943, the date this regulation takes effect, if you sell, offer to sell or deliver any meat cut, variety meats or edible by-products, specified in this regulation at a price higher than your ceiling price for the grade or type, or if you otherwise violate any provision of this regulation, you are subject to the criminal penalties, civil enforcement actions, license suspension proceedings, and suits for treble damages provided for by the Emergency Price Control Act of 1942, as amended. * * *

* * * * *

SECTION 20. *Description of retail beef, veal, lamb and mutton cuts.*—All retail cuts covered in the following specifications

shall be trimmed as described before the cuts may be weighed or sold to the customer. No fat shall be added to any of the cuts before they are weighed or sold to the customer.

(a) Retail beef cuts. * * * (3) From standard wholesale short loin.

(i) Porterhouse steaks.

(ii) T-Bone steaks.

(iii) Club steaks.

* * * * *

Porterhouse, T-Bone and club steaks are made from the standard primal short loin. Porterhouse steaks contain a large portion of the tenderloin. T-Bone steaks contain a small portion of the tenderloin. Club steaks contain no tenderloin. All fat exceeding one inch in thickness shall be trimmed from these steaks. * * *

* * * * *

SECTION 22. * * * (s). *Retail Ceiling Prices for Beef, Veal, Lamb and Mutton*—fresh, cured and frozen—Zone 9 North.

[For stores in Groups 1 and 2 as provided in Maximum Price Regulation No. 355, effective June 21, 1943].

Beef

1. Steaks:

* * * * *

3. Club, 55¢ per pound Grade AA or Choice; 51¢ per pound Grade A or Good.

STATEMENT

On February 9, 1945, petitioner was charged in four indictments, which were consolidated for

trial, with wilfully failing to comply with maximum price regulations established by the Price Administrator, in violation of the Emergency Price Control Act of 1942 (R. 9-27). Indictments Nos. 12972 (R. 9-10) and 12974 (R. 23-25) charged that in the operation of a retail meat market petitioner made specified sales at prices in excess of the ceilings fixed by Maximum Price Regulation No. 355. Indictments Nos. 12973 (R. 10-22) and 12975 (R. 25-27) alleged that in the operation of a slaughtering plant petitioner engaged in the sale of meat at wholesale and that he made sales at prices in excess of the price ceilings fixed by Revised Maximum Price Regulation No. 169.¹ Upon conviction by a jury, petitioner was sentenced to imprisonment for nine months and to pay a fine of \$2500 on indictment No. 12972. On each of the other three indictments petitioner was sentenced to imprisonment for nine months, to be served concurrently with the sentence in No. 12972. (R. 217-220.) Upon appeal to the Circuit Court of Appeals for the Third Circuit, the judgments were affirmed (R. 233).

As we show below, the only judgment which need be sustained to support the sentence imposed upon petitioner is the judgment in No. 12972.

¹ One Harry G. Sobel, an employee of petitioner, was indicted as a codefendant in Indictments Nos. 12974 and 12975; he was acquitted on all counts but one (R. 215-216).

The indictment (R. 9-10) in that case charged that on or about October 13, 1944, petitioner sold to Mrs. Violet Agran a club steak at a price in excess of the ceiling price fixed by Maximum Price Regulation No. 355. The evidence in support of the indictment shows that on October 13, 1944, Mrs. Agran, an investigator for the Office of Price Administration (R. 37), purchased a club steak, grade A, weighing one pound four ounces from petitioner for eighty-five cents; that the ceiling price for the steak was fifty-one cents per pound; and that she was overcharged seventeen cents per pound (R. 37-39). In describing the transaction Mrs. Agran testified that she asked to purchase some T-bone steaks, that petitioner said "I will give you better than T-bone," and that he then took out "Some meat wrapped in cellophane paper, and he cut it in two slices, trimmed it well and weighed it. It came to one pound and four ounces on the scale" (R. 59). Some of the fat was trimmed off the meat before it was weighed and after it was weighed Mrs. Agran was told that it would cost eighty-five cents (R. 59, 63).

ARGUMENT

Petitioner reasserts in this Court the contentions which he urged in the circuit court of appeals in respect of his conviction under each indictment. Those contentions, we believe, were

properly disposed of by the court below, but we deem it unnecessary to discuss any of the contentions except that involved in No. 12972, for the nine-month sentences imposed under the other three indictments are to run concurrently with the nine-month sentence in No. 12972. *Hirabaya-shi v. United States*, 320 U. S. 81, 85, 105.

In urging (Pet. 18-22) that the evidence is insufficient to support his conviction in No. 12972, petitioner predicates his argument on the fact that the Government ascertained that the sale price was over the ceiling by dividing the weight of the steak actually received by Mrs. Agran into the purchase price, thus showing that the sale price was at the rate of sixty-eight cents per pound, considerably in excess of the ceiling price of fifty-one cents. Petitioner urges that the testimony shows that some fat was trimmed from the steak before it was weighed and that the weight of the trimmings, which was not shown, might have been enough to justify the price which Mrs. Agran was charged for the meat.

Since Section 20 of Maximum Price Regulation 355 (*supra*, pp. 3-4) provides that all fat exceeding one inch in thickness shall be trimmed from a club steak before it may be weighed or sold to a customer, petitioner's argument could have application only to such fat under one inch in thickness as he might have removed from the

steak. Nothing in the record shows whether it was such fat which was trimmed from the steak or whether it was fat in excess of one inch. There is no occasion, however, to speculate in this respect. For we think that the evidence indisputably shows that none of the trimmed fat was, in fact, included in the sale price. Rather, the sale price was fixed solely on the basis of the meat which Mrs. Agran actually received. She testified that petitioner trimmed some fat from the steak and then placed it on the scale. It weighed one pound four ounces and petitioner told Mrs. Agran it would cost eighty-five cents. None of the fat which was trimmed from the steak, so far as appears, was placed on the scale and weighed and nothing in the course of the transaction indicated to Mrs. Agran that she was paying for more than the one pound four ounces of meat which she received. Petitioner offered no testimony showing that he included the weight of the trimmed fat in calculating the price which he fixed for the meat or that he customarily operated his business in that manner. In this state of the record we think that the jury was entitled to find that the sale price was fixed on the basis of the meat which Mrs. Agran actually received, and that petitioner thus sold the meat to Mrs. Agran at a price in excess of the ceiling price of fifty-one cents per pound.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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FEBRUARY 1946.